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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH GIOVANNI CEFALU, Defendant and Appellant.	A130710 (Contra Costa County Super. Ct. No. 05-100595-8)

I.

INTRODUCTION

Appellant Joseph Giovanni Cefalu was convicted of second degree robbery. The sole issue he raises on appeal is the alleged failure by the trial court to give sua sponte a unanimity instruction to the jury, which he claims infringed upon his due process right to be found guilty by a unanimous jury. We discern no error and therefore affirm.

II.

PROCEDURAL BACKGROUND OF CASE

An information was filed by the Contra Costa County District Attorney's Office on June 3, 2010, charging appellant with one count of second degree robbery. (Pen. Code,[1] § 211, 212.5, subd. (c).) The information also alleged that during the commission of the crime, appellant used a knife, a deadly weapon within the meaning of section

[1] All further statutory references are to the Penal Code unless otherwise indicated.

12022, subdivision (b)(1). Appellant plead not guilty and denied the deadly weapon enhancement. The case was set for trial, which commenced on August 18, 2010.

After selecting a jury, testimony began the following day. Trial continued a third day, during which testimony was heard. Testimony was completed on the fourth day of trial. Counsel gave their respective closing arguments, the trial court instructed the jury, and deliberations commenced. The following day the jury delivered its verdict finding appellant guilty of second degree robbery, but also found that he did not personally use a deadly weapon in the commission of the crime. The matter was continued for sentencing.

Prior to sentencing, appellant filed a sentencing memorandum. In it, counsel argued that appellant should be granted probation, with reasonable local custody time imposed as a condition of probation. A presentence probation department report was submitted to the court, which recommended that appellant be sentenced to state prison and not be granted probation.

A sentencing hearing was held on October 22, 2010. Appellant was sentenced to two years in state prison, the execution of which was ordered suspended, and he was placed on formal probation for three years with conditions imposed, including that he serve one year in county jail. As a further condition of probation, appellant waived 189 days of local custody credit he had earned up to that date. This appeal followed.

III.

FACTS ADDUCED AT TRIAL

The first person called to testify at trial was N.M., a minor.[2] She had known appellant for about one year during which the two dated. On the morning of April 17, 2010, appellant and his friends B.K., C.T., and R.S. picked up N.M. in a silver Acura. The group was taking N.M. to her home. On the way, she heard B.K. talking to C.T., telling him that they wanted to "pull a lick," which, according to N.M., is slang for "jacking someone," or "stealing items from a person." Appellant did not respond to this

[2] Based on our review of the record before us, for minors' privacy protection, we exercise our discretion to adopt the usage of initials only for all individuals mentioned in this opinion except appellant. (§ 959.)

comment. He was just riding in the car and talking to N.M. N.M. told them that what they had said "was stupid," and she was dropped off after B.K. told her to "[m]ind your own business."

L.K. testified that she was the girlfriend of R.S. She knew four of the young men, including appellant, who were identified as being together on the day of the incident. About two weeks after L.K. heard they had been arrested, C.T. called her and asked her to "throw away the kid's speakers and cell phone." He said that if she did not do it, R.S. would get in more trouble. C.T. told her that the items had been taken from "a kid." He told her where she could find the items at R.S.'s residence. After speaking with C.T., L.K. found and collected the items, which included a Blackberry Curve cell phone, in the garage of the residence and threw them into the garbage.

The alleged victim, S.L., went to Taco Bell in Danville at about 1:00 p.m. on April 17, 2010. After missing the bus to get there, his friend K. gave him a ride. S.L. went to Taco Bell "to get some weed," meaning marijuana. He was expecting to buy it from someone he only knew as "Dude."

Some time later while S.L. was waiting for "Dude" outside Taco Bell, a gray Acura pulled up with four people in it. One of them rolled down a car window and said to S.L., "Do you want to buy some trees?" This meant marijuana. S.L. did not want to buy from someone he did not know so he declined the offer. But, he changed his mind, walked up to the Acura, which was not parked, and said he wanted to buy. He was told to give one of the car's occupants the money first, "and then I'll show you." When a person wearing a black T-shirt exited the vehicle, S.L. gave him $20. The person took the money, returned to the car, and the Acura drove away.

After the group left, S.L. started walking home. The Acura reappeared and pulled up behind him. Several people got out of the car. One person wearing a red jersey, later identified as appellant, approached S.L. and started to frisk him. The person in the red jersey then started to grab S.L.'s "stuff," including his MP3 player and his BlackBerry Curve cell phone. While being frisked, the person wearing the black T-shirt told S.L. that if he did not give the person in the red jersey all of his "stuff," "he'll stab you." The

person in the red jersey pulled out a knife just far enough for S.L. to see it, and then put it back in his pocket. In addition to his cell phone and MP3 player, the person in the red jersey also took S.L.'s money, backpack, and sweatshirt. The backpack contained a set of small speakers. S.L. memorized the license number of the Acura as it drove off, and called the police a few minutes later.

B.K. testified that he was arrested with appellant for robbery and that he was in jail awaiting charges. B.K. confirmed that he, R.S., C.T., and appellant were together on the day of the incident. The group was together in R.S.'s car. They talked about robbing someone before they got to Taco Bell. They wanted to steal some marijuana from a dealer. Their target was "a guy" who worked at Taco Bell. They drove the car around the back to see if that person was "out there" in his car. The person was not there, but S.L. was in the lot behind the restaurant instead. B.K. and the group in the Acura made contact with S.L., who asked them if they had any marijuana. S.L. was told to give them money and they would get the marijuana. When S.L. opened his wallet and pulled out $20, B.K. could see there was more money inside.

The group took the money and drove off. B.K. told the others that he thought S.L. had more money in his wallet. In response, the group decided to return. They drove back and made contact again with S.L. Appellant got out of the car, grabbed S.L., pulled up his (appellant's) shirt, and told S.L. them all of his money and "stuff." When appellant pulled up his shirt, he was showing S.L. the knife he was carrying. S.L. appeared to be scared. Appellant then went through S.L.'s pockets, took what he had, and grabbed his backpack. At some point C.T. also got out of the car, but he just stood there. Appellant came back to the car and they drove off.

R.S. testified that he pleaded to being an accessory to robbery for what happened to S.L. It was agreed that as part of his negotiated plea, R.S. would testify and would do so truthfully. He recalled that on the day in question he was with C.T., B.K., and appellant. They talked about robbing someone for marijuana. This was not in reference to any particular person. He remembered going behind Taco Bell and seeing S.L. there. The group was going to ask him if he needed any marijuana.

S.L. gave someone $25 or $30. R.S. could see that S.L. had some more money in his wallet. R.S. then drove off. They decided to go back when someone said that S.L. had more money. When they got back to where S.L. was standing, appellant and B.K. got out of the car. After exiting they went up to S.L. and "took his shit." R.S. saw S.L. hand over his backpack. He also saw appellant reach into S.L.'s pockets. After the two got back into the car, R.S. drove off.

An attempt was made to store the stolen goods in R.S.'s garage. The backpack was thrown out of the car window during the drive to R.S.'s house. Ten to fifteen minutes after S.L. was robbed, the car was stopped by a deputy sheriff.

S.L. was recalled as a witness. He clarified that when the car came back to where he was after his $20 was taken, everyone in the car got out. The person in the red jersey came up to S.L. and started frisking his pockets. The person asked S.L. in an angry tone where his wallet was. S.L. did not resist because the person showed him a knife. This was right after the person in the black T-shirt said that the person with the knife would stab him if he did not give him all his money. The parties stipulated that S.L. identified B.K. as the person wearing the black T-shirt, and appellant as the person wearing the red jersey.

IV.

DISCUSSION

The sole issue on appeal is appellant's contention that the trial court prejudicially erred in failing to give the jury an unanimity instruction, which would have ensured that all 12 jurors agreed on the misconduct for which appellant was convicted of robbery.

A criminal defendant has a fundamental right to a unanimous jury verdict. Thus, where the accusatory pleading charges a single offense and the evidence shows multiple acts which could constitute the crime charged, either the prosecutor must elect the specific act relied upon to prove the charge, or the jury must be instructed it must agree unanimously on the specific criminal act which constitutes the offense. (*People v. Diedrich* (1982) 31 Cal.3d 263, 280-281.) The requirement that the jury unanimously agree on the same act typically applies to acts that could have been charged as separate

offenses. (*Id*. at pp. 280-283; *People v. Beardslee* (1991) 53 Cal.3d 68, 92.) A unanimity instruction is required "to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) Where the instruction is warranted, the trial court must give the instruction sua sponte. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.)

However, the unanimity requirement applies only where there are different acts, not where there are different theories of the crime. "It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of [the charged offense] as that offense is defined by statute, it need not decide unanimously by which theory he is guilty. [Citations.] More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator. [Citations.]" (*People v. Santamaria* (1994) 8 Cal.4th 903, 918-919.)

There was no need for a unanimity instruction under the facts and circumstances of this case. Only one robbery occurred; when the group returned to S.L. a second time and through force or fear took his wallet and backpack. The first brief confrontation with S.L. was not a robbery. The group simply misled S.L. into voluntarily giving the group $20 to buy drugs. While that transaction may have supported other charges, such as theft from the person (§ 487, subd. (c); *People v. Williams* (1992) 9 Cal.App.4th 1465, 1471-1472), it was not a robbery because there was no theft arising out of the use of force or fear. (§ 211; *People v. Burns* (2009) 172 Cal.App.4th 1251, 1256.)

In closing argument, the prosecutor argued that appellant was guilty of robbery on any one of three theories, to wit: as a principal, an aider and abettor, or as a coconspirator. However, in doing so, the prosecutor made clear that these theories all related to the second incident involving S.L. when his property was taken by force or fear. The reference to an initial, prior general agreement that the group try to find the Taco Bell employee and rob him was not argued as sufficient to sustain the robbery count against appellant. Instead, it was used by the prosecutor only to argue that it corroborated the evidence of the later actual robbery committed against S.L.

Appellant's reliance on *People v. Russo* (2001) 25 Cal.4th 1124 is unavailing. In that case the Supreme Court clarified the distinction between criminal liability arising from multiple events, and criminal liability resulting from different theories of criminal liability involving a single event: "[T]he unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Id*. at p. 1135.)

Because there is only one robbery but several theories of criminal liability proffered to support the conviction (*People v. Datt* (2010) 185 Cal.App.4th 942, 950), no unanimity instruction was required.

V.

DISPOSITION

The judgment is affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

_____
RIVERA, J.